UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JEREMY MICHAEL ATWOOD, Petitioner, vs. TERRY MAPES, Warden, Respondent.	No. C03-0034-MWB **REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF *HABEAS CORPUS***

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I. INTRODUCTION

This matter is before the court on a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The petitioner Jeremy Michael Atwood ("Atwood") filed the petition to challenge his June 12, 1998, conviction on two counts of vehicular homicide in the District Court in and for Linn County, Iowa. In his petition, Atwood claims the trial court erred in connection with its handling of a threatening telephone call received during the trial, and his trial attorneys were ineffective in their response to the court's handling of the threatening phone call. Atwood exhausted his state remedies, and his petition for writ of certiorari was denied by the United States Supreme Court. The parties have briefed the issues thoroughly, and the court now turns to consideration of Atwood's petition.

II. FACTUAL BACKGROUND: TRIAL PROCEEDINGS IN LINN COUNTY

In a case that received intense media attention before, during, and after the trial, Atwood was charged with striking and killing two children, ages 5 and 13, with his vehicle while they were walking to a neighbor's house to sell candy. The issues Atwood raises in his petition before this court all relate to events that occurred on June 9, 1998, the day on which closing arguments were to begin in the case.

On that morning, the parties and the trial court met to discuss jury instructions. Closing arguments were scheduled to begin at 10:00 a.m. At 10:24 a.m., the court announced to the parties and spectators that a matter had arisen that would postpone closing arguments until 1:00 p.m. At 1:15 p.m., the trial judge made the following record outside the presence of the jury, with Atwood, the parties' attorneys, and spectators present in the courtroom:

> THE COURT: The record should reflect that we're present in open court outside the jury's presence. Ladies and

> gentlemen, closing arguments were delayed this morning because the Court had been made aware that an anonymous call which was threatening in nature had been placed regarding this case.
>
> As a result, I have directed that additional security measures be taken to ensure the safety of the participants in this trial and the public as well. In addition, the circumstances of the call are being investigated by appropriate law enforcement personnel. To preserve the integrity of that investigation, it is not appropriate for the Court to provide additional details regarding the call at this time.
>
> In view of those circumstances, it will be necessary to delay the final arguments in this case until tomorrow morning at ten o'clock. And we will be in recess at this time. And the court attendant will have some further instructions for anyone who is intending to be present at that time. We're in recess until ten o'clock tomorrow morning.

Trial Tr. at 866-87.

Shortly thereafter, the trial judge met in chambers with Atwood, his attorneys Brian Sissel and Tim Ross-Boon, and the prosecutor Harold L. Denton, and the following record was made:

> THE COURT: On the record. Show that we're present in the Court's chambers. Mr. Denton appears on behalf of the State. Mr. Ross-Boon and Mr. Sissel are present as well. In addition, Jeremy Atwood, is personally present in chambers also. We're here so that we can make some record concerning a matter that caused the final arguments in this case to be delayed.
>
> The final argument was scheduled to begin in this case at 10 a.m. this morning. Just a few minutes before – before final arguments were to commence, the Court was made aware that there was an emergency call for Mr. Sissel. As I recall, Mr. Ross-Boon actually took that call for him. And then

Mr. Ross-Boon advised the Court that an anonymous call had been placed to the Public Defender's Office and received by Lee Ann Aspelmeier, who is their receptionist.

I'll summarize what she reported. She indicated that between 9:45 and 10 a male called the office and asked if she was listening and advised that he had been paid 50 dollars and instructed by some form of written note to indicate that the participants in this trial, including the prosecutor, perhaps defense counsel, and the jurors, would be killed in the event that a specific verdict were not returned.

And I think it's fair to say that she believes that that was a not guilty verdict, but is not positive about that. She indicated that she was fairly shaken when the call was received and knows that the caller meant to convey that a problem would arise if a specific verdict were returned. But it is not entirely clear which verdict was intended.

As a result of that call, we agreed that final arguments would be rescheduled for one o'clock to provide an opportunity for response by the Court. Law enforcement officers were immediately involved. Miss Aspelmeier was interviewed, and the Court has directed that additional security measures be taken to enhance the safety of the participants in this trial and the public. To this point in time there really have been absolutely no problems with regard to security during the first six days or so of the trial.

The jury is upstairs in the jury room, and they have not yet been told about the incident. And I wanted to give the parties a chance to say whatever they wished to say on the record about what course the Court should pursue at this time.

I did make a very general statement in open court before we came into [sic] make this record which, essentially, just advised those present in open court that an anonymous caller had made threats in connection with this case this morning and that, as a result, additional security measures would be taken. I indicated that it was not appropriate in view

of the investigation to provide additional details and simply rescheduled final arguments in the case until tomorrow morning at ten o'clock.

Counsel, I'll listen to you before making a final decision, but I tend to think that the most reasonable way to proceed here, and perhaps the fairest from the point of view of both the Defendant and the State, would be for the Court to personally make a brief statement to the jury informing them in general terms that the proceedings were delayed because of a threat that was called in. And I don't think it's necessary to provide them with all the specific details, but I think it is appropriate in view of concerns for their safety as well to provide them with general information indicating that there were general threats made to, essentially, all the participants in this case.

I would intend to tell them that I had referred the call for investigation and taken the actions that I thought were reasonable and appropriate to provide for additional security. And then instruct them that if anyone attempted to have any contact with them regarding the case, they should, as previously instructed, immediately let the Court know about that so that I could take whatever actions were appropriate. And then reconvene and indicate that they would be called upon to hear the case and decide it tomorrow morning at ten o'clock.

It seems to me that it would not be appropriate for me to answer a lot of questions. If they have questions, I probably would just have the reporter note those questions so the State and the Defendant would have an opportunity to be aware of those before I made any kind of a response.

Mr. Denton, do you have any comments regarding the State's position concerning that procedure?

MR. DENTON: Well, I don't see any particular harm in just telling them that. I think that – You know, I think under the circumstances, if we're not going to sequester them or lock them up for the night, there's not much point in giving

them much details about it. I mean, I don't see that there's anything in the threat that would indicate there's any real danger to them at this point anyway.

THE COURT: Mr. Sissel and Mr. Ross-Boon.

MR. SISSEL: Well, Judge, we would, first of all, object entirely to the Court instructing or informing the jury that their personal well-being was threatened in this manner. I think what it does is – I think what it does is it takes away from them being able to decide the facts of this case, and it puts undue pressure on them to return a verdict.

And, I mean, it's obvious, given the media in this case, given the amount of people who have been in the courtroom and been there the entire time on the victims' side, that this is a difficult case to begin with. And for them to find out that there's some anonymous person out there who made this call threatening their safety is too burdensome.

And I guess we would at this time – If the Court were still going to forge ahead and make a statement to them, we would make a motion for a mistrial based – based on that. And it's my understanding assuming that – or if the Court denies our motion for a mistrial, my other concern, which we indicated prior to going into the courtroom to announce to the general public, that if – we would at least ask that they be sequestered.

I have a feeling that this is going to be headlines in the newspaper tomorrow; and I might be wrong on that but, certainly, tomorrow will tell. That family members, significant others, whoever get this information that there's been threats made and their safety may be in jeopardy, would have influence on these people. And I just – I just feel by sending them home and putting them in that position it's going to open another can of worms.

So I guess the first thing would be the motion for a mistrial. The second thing is we would ask, if the mistrial is not granted, that they be totally sequestered.

And then I guess from the questionnaire point of view – I mean, I guess my concern, which we have talked about earlier, is the questions that they are going to have and the concern they might have. And if the Court is going to go up and just note the questions and then come back down and consult, you know, that might rectify that problem. If you're going to make a blanket statement and then take their questions and then we can come down and deal with them, that would probably be the best way to handle that.

THE COURT: Obviously, my intention was to take a court reporter up with me. I don't know if you –

MR. SISSEL: Yeah, that's my understanding.

THE COURT: Anything else, Mr. Denton?

MR. DENTON: Well, Your Honor, obviously, this was an emotional case to begin with. We have all known that since the beginning. And, you know, I think there were concerns about the security to begin with in the courtroom. So I think – To allow an anonymous threat to interfere with this process, I think it creates a situation where, you know, in the future all you got to do is make an anonymous phone call and you can derail the entire proceedings.

So I think – Obviously, we don't want them to be told that, okay, you have got to decide it this way or your lives are in danger. But I don't think that – you know, I don't think we really need to tell them all that much. I think what the Court proposes is reasonable, but I just don't think we need to tell them much at all.

(Pause in proceedings as Defense counsel are conferring off the record.)

MR. SISSEL: You know, I have nothing further to add for the Court.

THE COURT: Well, you know, it's a difficult situation. But, obviously, from the point of view of the State and any defendant in a criminal case, the rule cannot be that any time somebody makes what we all know in most instances is a crank call that the process comes to an end.

I'm willing to remain vigilant to make sure that we have a jury that can decide this case fairly and impartially. But I don't think it's appropriate or in the interests of justice to pull the plug at this time just because we have had an anonymous caller make threats to virtually all the participants involved in the trial.

So I will – My intention is to take a court reporter up and provide the jury with general and brief information about why we're delayed. And I'm going to have them stay for a bit so that we can see whether or not they have any questions, and then also discuss further the issue of whether or not sequestration should be considered or not in this case.

All right. So – Why don't you give me 15 minutes to do that.

Trial Tr. at 867-74.

The trial judge next met with the jury, with only the judge, the jury, and the court reporter present, and the following record was made:

THE COURT: For the benefit of the record, the Court is visiting with our 14 jurors in this case in our jury conference room.

Ladies and gentlemen, I wanted to explain to you why we're delayed. We made wonderful progress the first six days, and we're a day or two ahead of schedule. But what happened this morning was shortly before we were scheduled to begin our closing arguments there was brought to the Court's attention the fact that an anonymous phone call that

was threatening in nature and directed to virtually all of the participants in this trial had been placed. And, obviously, that was something that I then had to deal with.

Unfortunately, this is something that occasionally occurs at the courthouse, not often but once in awhile, and we just have to deal with an issue when it comes up. And I have taken what steps that I think are appropriate. Obviously, involved some law enforcement officers to investigate the circumstances. And, in addition, taken some steps to ensure that we have enhanced security during the course of the trial.

And when we come back tomorrow, I wanted to make you aware that I have got our metal detector, and things like that, that are set up, and I'm going to go ahead and use those. We use those fairly often in connection with cases that occur at the courthouse. And I am going to go ahead and set those up and have those operative tomorrow.

One thing I guess I would like to say is, you know, I know this is something that's new to you, but we occasionally have to go down this road. Obviously, if somebody makes a call, even if we believe it is a crank call, we have to react to it appropriately rather than ignore it, which is what I have tried to do here.

And right now we're scheduled to reconvene with closing arguments commencing tomorrow at ten o'clock. Because this all happened we could not make the arrangements that were necessary to go ahead and start arguing the case this afternoon. So that's where we are at this point in time.

I guess one thing that I would like to tell you by way of reassurance is I have been in this district for 25 years, 12 as a lawyer, and 13 as a judge; and although we get calls of this nature from time to time, I'm aware of no occasion in 25 years that I have been around here where anybody has ever followed up in connection with a call of this nature. So I did feel, though, that it's appropriate to make you aware of why you

have been sitting up here since ten o'clock since we have tried to minimize occasions when that has occurred during the trial.

Now I have not yet excused the parties. They're downstairs, and they're waiting for some instructions from the Court just to confirm that we're starting tomorrow at ten o'clock.

If you had any questions, I had indicated to them that I didn't feel it was appropriate for me to respond without reviewing a question that a juror may have had. But if there was anything that you thought you needed to ask the Court at this time, I can make a note of that; and if I can respond, I will. And if it's not something that's appropriate for me to respond to, I hope you would understand that that's the case.

And before we excuse you this afternoon, I do need to double-check with the parties. But anything that anybody wanted to take up with the Court?

(There was no response by any jury member.)

THE COURT: Well, I appreciate very much your patience. Obviously, this is something that was not what I would have planned for your morning this morning, or mine neither [sic] for that matter. But I've done what I believe it was necessary for me to do, and I'm trying to get all our "ducks in a row" so that we can get this case concluded. So bear with me, I should be able to tell you maybe within 15 minutes or so whether or not you can go on home, and we can get this case to the jury tomorrow morning hopefully.

Okay. All right. Thanks for your patience, jurors.

Trial Tr. at 874-77.

The judge then returned to chambers to meet with Atwood and the parties' attorneys. The court reporter read back the record that had been made when the judge met with the jurors, after which defense counsel left the room and conferred for about five minutes. When defense counsel returned to the room, the following record was made:

MR. SISSEL: I guess, Judge, we would – we would like to make a brief record. Obviously, we were opposed to the jury having any knowledge of this – this information and – to begin with, putting them in a position of having threats against their life or their safety. And I think now that this has been done, it's tarnished, spoiled the jury panel.

You know, they're going to see all the extra security, knowing about the metal detectors being involved. It tells you, obviously, someone – the potential of someone carrying in a weapon of some sort, or at least trying to – the security trying to – to avoid that happening. I think that this is going to put undue pressure on them.

I know that before the Judge – before the Court went up to talk with the jurors I think we all kind of agreed that there was going to be a statement read and then leave an open forum. My understanding of reading the thing that the jury didn't respond, or didn't have any questions regarding that. I think – And whether that's our fault for not being present in the situation, was unable to see the reactions, the demeanor to the jury members when this was told to them, you know, I kind of think it puts –

And this Court has – has put itself in a position where – potentially becoming a witness in this thing because we don't know if – I mean, there's a statement in there that they could – have to sit around – if they have any questions, they have to sit around until we can answer them, if the Court wasn't on its own being able to answer the questions for them.

They have been sitting there since – well, at least ten o'clock this morning, and it's now 2:30ish. You know, I don't know what's going through their minds. And it's my understanding the Court is going to release them to go home without any further sequestration. We've addressed the media. We have addressed the public.

This is, obviously, going to be something that is going to be of utmost concern to these people. And I think that by

submitting this case to this, jury it's going to – it's going to unfairly prejudice Mr. Atwood.

I think the jury is going to have in the back of their mind, obviously, let's get this thing over with, let's get this guilty verdict on file, and get out of here. I know there's no indication as to what the threats were or any other indication as to whether there was any coercion one way or another about a verdict.

But, you know, I just think in a criminal case, and especially in a situation like this, it's – it's obvious that that's what – that's what is expected out of these people is a guilty verdict. And I think at this point we have – we have spoiled this jury to the point where any admonitions, any further acknowledgment of the threats, any further questioning of this jury is going to do nothing more than put them in a very pressured situation in which they're not going to be able to decide this case based solely on the evidence.

And there's going to be outside factors. And I just don't think that is going to allow Mr. Atwood a fair trial at this particular moment.

THE COURT: Mr. Denton.

MR. DENTON: Your Honor, I believe that the record so far supports the fact that the jury should be able to decide this case on the merits. The additional security precautions are something that, if we had received a threat, I think we would all agree we would want to put those into place.

We have discussed this case before that perhaps we ought to have had those anyway. Now, actually, the conduct of the parties – of the spectators in this case has been exemplary on both sides I think. I have seen nothing on the part of either – either of the – And this clearly is a case where you have a division and sort of two identifiable sides and families. And up to this point that conduct has been exemplary.

So there really has been no need for security. But I think adding the security might have created the sort of speculation to the jury without being told something that might have been more harmful than not telling them anything.

So under the circumstances – They have been told we got an anonymous call. I think they understand that probably it's just a crank call they can ignore; and I think, under the circumstances, we made an adequate record. They can come in tomorrow morning, we can argue the case and submit it to them. And I think we can still get a fair verdict from the jury.

THE COURT: All right.

MR. SISSEL: I would – If I could just – You know, I would emphasize to the Court that, you know, none of us know[s] what's going on in those jurors' minds. Obviously, no one spoke up to the Court when they were addressed. Whether they wanted to get out of there after sitting in there all day, whether they didn't want us to say anything, I don't know. But to put them in a position at this point of telling them there's been threats, I just don't think the jury is going to be able to be fair.

THE COURT: Well, I'll respond briefly. I find no basis for sustaining the motion at this time. I would agree with comments made by counsel for the State in terms of his characterization of the behavior of the spectators on both sides. I think it has been exemplary taking into account the emotionally-charged nature of this case.

And, frankly, I really don't see anything in this jury's conduct or demeanor that would indicate to me that they are intending to do anything but give the evidence careful consideration and then decide the case based upon the evidence and the Court's instructions. I think, frankly, the procedure that we have employed here since the call was received is reasonable under the circumstances.

> Obviously, it would be nice if things like that – this did not occur, but they do in today's world, and I've tried to respond in a manner that is fair to both sides and the jury as well.
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> Anything else for the record before we adjourn?
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> MR. DENTON: No, Your Honor.
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> MR. SISSEL: So just so I'm straight. They're not going to be sequestered and you're just going to send them home until tomorrow morning?
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> THE COURT: I'm not going to sequester them, but I am going to admonish them at some length again. And I can either do that by having the court attendant read the lengthy admonishment that I usually employ, having you review that first, or we can do that right in the courtroom in your presence if you would prefer.
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> MR. SISSEL: I would prefer in the courtroom.
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> THE COURT: Okay. We'll do that.

Trial Tr. at 878-83.

The trial court then admonished the jury, in open court, "not to listen to, view, or read any form of media overnight and while this case is in progress"; not to visit the scene of the accident; not to conduct any investigation on their own; and not to talk with anyone, or allow anyone to talk with them, about the case prior to the jury beginning its deliberations. He further instructed the jurors to advise the court immediately if someone should try to contact them about the case. Trial Tr. at 884-85. The jury was excused until the following morning.

At about 10:00 a.m. on June 10, 1998, court reconvened. At the commencement of the day's proceedings, the court admonished the jury further as follows (in pertinent part):

> Before I do proceed with the reading of the Court's instructions, there is one other admonition that I did wish to give you at this time. Obviously, you are aware that there was an incident yesterday which caused the final arguments in this case to be delayed until today. That event was initiated by someone that is unknown to the Court; and that event, obviously, was beyond the control of the Court at the time or the parties to this action to prevent.
>
> You're instructed by the Court that you are to determine this case based only upon the evidence presented during the trial, taking into account the Court's instructions. The Court is asking and instructing you not to engage in any speculation about that incident, and please keep in mind that evidence does not include anything that you saw or heard about this case outside the courtroom.

Trial Tr. at 886-87. The court then instructed the jury, the attorneys made their summations, and the case was submitted to the jury at 1:10 p.m.

At 3:10 p.m. on June 10, 1998, Atwood and the parties' counsel met with the trial judge in chambers, and a further record was made. Atwood's attorneys renewed their motion for a change of venue based on additional publicity that was generated as a result of the telephone threat. Atwood's attorneys offered three exhibits consisting of videotapes of news broadcasts from Waterloo and Cedar Rapids, Iowa, the previous evening. Counsel also renewed their motion for a mistrial based on the jury being informed about the threat, arguing as follows:

> And then, in addition, we would again renew our Motion for a Mistrial in that now that the jury has heard that there are threats directed toward the participants of this trial, we feel that the outside influences that is put on this jury is not going to be – they're not going to be able to independently decide this case based on the evidence alone, and the outside influences will have an effect on their decision-making.

Trial Tr. at 978. The trial judge took the matter under advisement, and indicated he would view the videotapes and make a supplemental record "if that's necessary." Trial Tr. at 979. No further record was made concerning the renewed motions, and the verdict was rendered on June 12, 1998, with the jury finding Atwood guilty of two counts of vehicular homicide. *See* Trial Tr. at 981-83.

Atwood's appeals of his conviction will be discussed below, in the context of each of the arguments he has raised in this action.

III. STANDARD OF REVIEW

The court's review of Atwood's petition is governed by the standards set forth by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The *Williams* analysis focuses on the requirements of the federal *habeas* statute, 28 U.S.C. § 2254, in light of amendments enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The amendments "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams*, 120 S. Ct. at 1516. For a state prisoner "to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by § 2254(d)(1) . . . [which] modifies the role of federal habeas courts in reviewing petitions filed by state prisoners." *Williams*, 120 S. Ct. at 1518. Specifically, the AEDPA limited the source of legal doctrine upon which federal courts may rely in considering a state prisoner's *habeas* petition to "clearly established law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams*, 120 S. Ct. at 1506-07, 1516.

Prior to the AEDPA's enactment, federal courts could "rely on their own jurisprudence in addition to that of the Supreme Court." *Williams*, 120 S. Ct. at 1507. The Court explained that subsequent to the AEDPA:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 404-05, 120 S. Ct. at 1519 (quoting 28 U.S.C. § 2254(d)(1)).

Under the first category, a state-court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.*, 529 U.S. at 405, 120 S. Ct. at 1519. The Court explained:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Id., 529 U.S. at 412-13, 120 S. Ct. at 1523. Further, "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state-court decision." *Id.*, 529 U.S. at 412, 120 S. Ct. at 1523.

The second category, involving an "unreasonable application" of Supreme Court clearly-established precedent, can arise in one of two ways. As the Court explained:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from

> our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id., 529 U.S. at 407, 120 S. Ct. at 1520 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Notably,

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id., 529 U.S. at 411, 1250 S. Ct. at 1522.

If the state court decision was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and if it did not involve an unreasonable application of that law, then the federal court must determine whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

These are the principles the court must apply in reviewing Atwood's petition.

IV. DISCUSSION

A. Jury's Exposure to Extrajudicial Material

Atwood filed a direct appeal in which he asserted, *inter alia*, that the trial court "exposed the jury to extrajudicial material, which affected their ability to render an impartial verdict – a violation of the Sixth and Fourteenth Amendments to the United States

Constitution and article I, sections IX and X of the Iowa Constitution[.]" *State v. Atwood*, 602 N.W.2d 775, 778 (Iowa 1999).

In denying relief on this issue, the Iowa Supreme Court held as follows:

> In the context of alleged juror misconduct based on consideration of evidence outside the record, we have said "when there is proof that extraneous material has reached the jury room, the party seeking to overturn the verdict must show 'that the misconduct was calculated to, and with reasonable probability did, influence the verdict.'" *State v. Henning*, 545 N.W.2d 322, 324-25 (Iowa 1996) (quoting *Doe v. Johnston*, 476 N.W.2d 28, 35 (Iowa 1991)).
>
> This defendant asks that we adopt a per se rule that would make any communication between a judge and jury outside the presence of the defendant, reversible error. We decline to adopt such a rule. We believe that, for a claim of error to prevail in such a case, the party making such a claim must show a reasonable likelihood that the extraneous evidence influenced the verdict. *Cf. Henning*, 545 N.W.2d at 324-25.
>
> One resolution of the problem raised in this scenario would have been for the trial court to simply grant the defendant's motion for mistrial. We do not believe this was required under the circumstances of this case, nor would this resolution be advisable on policy grounds; litigants whose trial was proceeding badly could simply arrange for a threatening phone call and thereby start over again under a mistrial order. The court, we believe, acted properly to alert the jurors, without alarming them and without informing them that the threatened action was contingent on a certain jury verdict. . . .
>
> . . .
>
> The defendant does not claim any of the judge's comments were inaccurate or prejudicial. Rather, he claims that, if the court was to discuss the matter with the jury, it should have gone further and inquired of the jurors as to what effect, if any, the threat had on them. To do so, of course,

> would magnify the event and exacerbate any effect it might have on the jurors. Although the defendant's lawyers voiced their concern that the threat would be reported in the evening news, the jury was admonished, as it had been throughout the trial, that they were to avoid media coverage and conversations with others about the case. The court was entitled to presume the jurors would follow its admonition. *State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998). The court's refusal to examine the jurors sua sponte was within its discretion. *See State v. Frank*, 298 N.W.2d 324 (Iowa 1980) (no abuse of discretion in not sua sponte examining jurors regarding effect of trial publicity). We find no error or abuse of discretion in the court's procedure in discussing the matter with the jury.

Atwood, 602 N.W.2d at 778-80.

Atwood filed a petition for writ of certiorari in the United States Supreme Court that was denied without opinion on April 24, 2000. *Atwood v. Iowa*, 529 U.S. 1091, 120 S. Ct. 1729, 146 L. Ed. 2d 649.

In the present action, Atwood renews his claim that the trial court erred in exposing the jury to information about the threatening phone call. *See* Doc. No. 8, pp. 23-33. Further, Atwood argues the Iowa courts erred in placing the burden of proof on him, and not the State, to prove the extraneous material influenced the verdict. In support of this premise, he cites numerous cases from federal circuit courts of appeal, all of which were decided prior to *Williams*. *See id.*, pp. 25-26. As Chief Judge Mark W. Bennett noted in *Tunstall v. Hopkins*, 126 F. Supp. 2d 1196, 1206 (N.D. Iowa 2000), "[I]n the wake of *Williams*, this court is prevented from looking to lower federal court decisions in determining whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court." *Id.* (citing *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000)). Accordingly, the cases cited by Atwood are inapplicable to the court's consideration of Atwood's petition.

Atwood also cites *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 451, 98 L. Ed. 654 (1954). In *Remmer*, the Court held:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. (citing *Mattox v. United States*, 146 U.S. 140, 148-50, 13 S. Ct. 50, 52-53, 36 L. Ed. 917 (1892); *Wheaton v. United States*, 133 F.2d 552, 527 (8th Cir. 1943)). Thus, if *Remmer* were applicable here, the burden would be on Mapes to establish that the jury's exposure to information about the telephone threat was harmless.[1]

However, *Remmer* arose from a *federal* prosecution. Different standards apply to *habeas* actions arising from federal convictions than to petitions challenging state convictions. *See Tunstall*, 126 F. Supp. 2d at 1202 ("[T]here is a significant distinction between the standard that is applied when considering a claim raised by a state prisoner contending he was denied the right to a trial by an impartial jury and the standard that is applied when considering the same claim raised by a federal prisoner."). In affirming Judge Bennett's ruling in *Tunstall*, the Eighth Circuit noted it is unclear whether the presumption of prejudice applied in *Remmer* also would apply to a court's consideration of a *habeas* petition arising from a state conviction:

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[1] In this discussion, the court assumes, but does not decide, that the contact between the trial judge and the jury was a "private communication."

> Federal law does not clearly compel a presumption of prejudice in this case. [FN4] In *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654 (1954), the Supreme Court held that "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Accord United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Several circuits, including ours, have extended the *Remmer* presumption to claims alleging juror exposure to extraneous information, including claims of mid-trial media exposure. *See, e.g.*, *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 922 (10th Cir. 1992); *United States v. Perkins*, 748 F.2d 1519, 1533-34 (11th Cir. 1984); *United States v. Hillard*, 701 F.2d 1052, 1064 (2d Cir. 1983); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981). However, other circuits have confined the application of *Remmer* to cases alleging third-party contact with jurors. *See, e.g.*, *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001); *United States v. Williams-Davis*, 90 F.3d 490, 501-02 (D.C. Cir. 1996); *United States v. Boylan*, 898 F.2d 230, 260-61 (1st Cir. 1990).
>
> > FN4. We note Tunstall's trial did not involve the type of "media circus" that mandates a presumption of prejudice. *See Irvin v. Dowd*, 366 U.S. 717, 725-28, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

Tunstall v. Hopkins, 306 F.3d 601, 610-11 & n.4 (8th Cir. 2002).

Judge Bennett observed, in *Tunstall*, that the Supreme Court has made it clear the presumption of prejudice applicable in federal convictions when the jury is exposed to information with a high potential for prejudice does not amount to a constitutional ruling the states are compelled to follow. *Tunstall*, 126 F. Supp. 2d at 1202-03 (discussing *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), and

citing *Murphy v. Florida*, 421 U.S. 794, 797, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975); *Britz v. Thieret*, 940 F.2d 226, 231 (7th Cir. 1991); *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 2333, 147 L. Ed. 2d 405 (2000); *Harris v. Rivera*, 454 U.S. 339, 344-45, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981) (*per curiam*); *Mu'Min v. Virginia*, 500 U.S. 415, 111 S. Ct. 1899, 1903-04, 114 L. Ed. 2d 493 (1991)). Judge Bennett further recognized that prejudice may be presumed, even relating to state court convictions, "when pretrial publicity is so pervasive, inflammatory and widespread that the trial becomes 'but a hollow formality,' or when pre-trial and mid-trial publicity is so invasive that the setting of the trial becomes inherently prejudicial." *Tunstall*, 126 F. Supp. 2d at 1203 (quoting *Murphy*, 421 U.S. at 803, 95 S. Ct. 2031; additional citations omitted). Judge Bennett explicated this standard further, as follows:

> [I]rrespective of whether the conviction was obtained in federal or state court, prejudice may be presumed in certain egregious pre-trial/mid-trial and "media circus" situations. . . . The Supreme Court has cautioned, however, that those cases in which "pretrial publicity presents [an] unmanageable threat[ ]" to a defendant's right to an impartial jury trial are "relatively rare." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

Tunstall, 126 F. Supp. 2d at 1204 (citations omitted).

Atwood likens the potential prejudice from the jury's receipt of information about the threatening phone call to prejudice from pretrial publicity. *See* Doc. No. 8, p. 28 & n.13 (citing *United States v. Davis*, 583 F.2d 190, 197 n.8 (5th Cir. 1978) (recognizing similarities between the two situations)). He appears to claim the jury's receipt of information about the threatening phone call was so invasive that the setting of the trial became inherently prejudicial and the jury's deliberations "but a hollow formality." However, he has failed to offer convincing evidence to undermine the state courts' factual

finding that the jurors' impartiality was not affected by the trial court's actions in exposing the jury to information about the telephone threat. As the Supreme Court held in *Rushen v. Spain*, 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983):

> [T]he factual findings arising out of the state courts' post-trial hearings are entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). ***The substance of the ex parte communications and their effect on juror impartiality are questions of historical fact entitled to this presumption.*** Thus, they must be determined, in the first instance, by state courts and deferred to, in the absence of "convincing evidence" to the contrary, by the federal courts. *See Marshall v. Lonberger*, [459] U.S. [422], [432], 103 S. Ct. 843, 850, 74 L. Ed. 2d 646 (1983). Here, both the state's trial and appellate courts concluded that the jury's deliberations, as a whole, were not biased. This finding of "fact" -- on a question the state courts were in a far better position than the federal courts to answer -- deserves a "high measure of deference," *Sumner v. Mata*, 455 U.S. 591, 598, 102 S. Ct. 1303, 1307, 71 L. Ed. 2d 480 (1982), and may be set aside only if it "lack[s] even 'fair support' in the record." *Marshall v. Lonberger*, *supra*, 459 U.S., at [432], 103 S. Ct., at 850.

Rushen, 464 U.S. at 120, 104 S. Ct. at 456 (emphasis added). *See Irvin v. Dowd*, 366 U.S. 717, 723-24, 81 S. Ct. 1639, 1643, 6 L. Ed. 2d 751 (1961) (trial court's determination of juror's impartiality should only be set aside upon showing of manifest error); *see also Prewitt v. Goeke*, 978 F.2d 1073, 1076-77 (8th Cir. 1992) (recognizing the above holding in *Rushen*, and concurring with Fifth Circuit's view that "the trial judge is in a unique position to appraise the prejudicial effect of *ex parte* communications on the jury") (citing *Young v. Herring*, 938 F.2d 543, 558 n.8 (5th Cir. 1991)). *Cf. Miller v. Fenton*, 474 U.S. 104, 113, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985) (Issues involving "inquiry into state of mind" may be treated as questions of fact, and "an issue does not

lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."). Therefore, the Iowa courts were correct in placing the burden upon Atwood to prove the extraneous information affected the jury's impartiality.

Here, the Iowa courts' determination that the trial court's actions did not affect juror impartiality are supported by the record. No juror asked a question or made a comment when the jury was told about the threat. After consulting with the district's chief judge, Atwood, and counsel for both parties, the trial judge took action he believed would minimize the effect of the threat on the jury, and there is no evidence the jury was influenced by the information. The jury deliberated for two days before reaching a verdict, indicating the information about the threat did not cause the jury to rush to judgment.

The court rejects Atwood's claim that telling the jury of the threat created an inference that he was responsible for the threat "because no reasonable mind would believe the state was responsible for the call." Doc. No. 8, p. 27 (citations omitted). Atwood ignores other possible interpretations the jury could have had of the information. The threat could have come just as easily from someone close to the victims who was intent upon a guilty verdict being rendered as from someone close to Atwood with the opposite intent.

Although there were alternative courses of action available to the trial court that, in retrospect, likely would have been more effective in ensuring the jury's continued impartiality after the trial court received the information regarding the threatening call,[2] the court cannot say the trial judge's actions were unreasonable under the circumstances. He instructed the jury properly and admonished them at least twice not to consider

[2]For example, the trial court could have told the jury nothing about the threatening call, and immediately sequestered the jury.

anything outside the evidence in their deliberations. The jury is presumed to have followed the trial court's instructions, and Atwood has offered no evidence they failed to do so. *See Tunstall*, 126 F. Supp. 2d at 1205 (citing *Jones v. United States*, 527 U.S. 373, 393, 119 S. Ct. 2090, 144 L. Ed. 2d 370 (1999); *Delli Paoli v. United States*, 352 U.S. 232, 242, 77 S. Ct. 294, 1 L. Ed. 2d 278 (1957); *United States v. Paul*, 217 F.3d 989, 997 (8th Cir. 2000) (all holding jurors are presumed to follow the court's instructions)).

For these reasons, the court finds Atwood's first claim -- that the trial court erred in informing the jury about the threatening call because the information affected the jury's ability to render a fair and impartial verdict – must fail. Atwood has failed to show the Iowa courts decided this issue in a manner contrary to clearly established federal law as determined by the Supreme Court, unreasonably applied that law to the facts of the case, or made an unreasonable determination of the facts in light of the evidence.

B. Denial of Right to be Present During Proceedings

In his direct appeal, Atwood argued the trial court "improperly denied [him] his right to be present during all trial proceedings," in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections IX and X of the Iowa Constitution. *Atwood*, 602 N.W.2d at 778. The appellate court held as follows on this issue:

> Atwood contends that the [trial] court, by discussing the matter [of the threatening phone call] with the jury in his absence, committed error. A criminal defendant has a right to be present at every stage of the trial, including conversations between the judge, attorneys, and jurors concerning the jurors' ability to be impartial. *State v. Wise*, 472 N.W.2d 278, 279 (Iowa 1991). Prejudice may be presumed if a defendant is absent from such conversation; however, any such presumption can be rebutted under a harmless-error analysis. *Id.* Only

> under exceptional circumstances is a per se rule of prejudice applied. *State v. Webb*, 516 N.W.2d 824, 830-31 (Iowa 1994).
>
> The court did not refuse Atwood the right to be present for the court's meeting with the jury; the defense did not request to be there (a matter discussed in connection with the claim of ineffective assistance of counsel). The judge advised the parties in advance what he planned to do, and he followed that plan. His comments to the jury were reported verbatim and read to the parties after the meeting. The parties had an opportunity to object both before (as to the procedure being proposed) and afterward (as to the actual content of the judge's remarks). The defendant made no specific objection; he merely demanded a mistrial, which the court properly overruled. Under these circumstances, we find no per se violation of Atwood's constitutional right to be present.

Atwood, 602 N.W.2d at 780-81.

In the present action, Atwood renews his claim that the trial court denied his constitutional rights by meeting with the jury outside his presence and the presence of his attorneys. *See* Doc. No. 8, pp. 33-37. He argues "the trial judge had the duty to offer, invite or include [Atwood] and his counsel in his meeting with the jury, regardless of [Atwood's] request to be there." *Id.*, p. 36. Atwood provides little more than argument in support of this proposition. *See id.*, pp. 33-37. He cites no Supreme Court case law addressing the issue beyond the general principles, recognized by the Iowa Supreme Court, that a criminal defendant has the right to be present at all stages of the trial, and prejudice may be presumed from the defendant's absence from any proceeding. *Id.*, pp. 33-35.

He cites one Eighth Circuit case where the court found no error in the way bomb threats were communicated to a jury, noting defense counsel in that case had witnessed the jurors' reactions to the threats and was able to question them to discover any adverse effects on their impartiality. *Id.*, p. 36, discussing *LaFrank v. Rowley*, 340 F.3d 685, 690

(8th Cir. 2003). *LaFrank* is largely irrelevant to the present inquiry, first because it does not represent clearly established Supreme Court precedent, and second because it is clearly distinguishable on its facts. Information about an amorphous threatening phone call carries far less risk of prejudice than information about two bomb threats. This is evident from the *LaFrank* jury's rush to judgment. The *LaFrank* jury deliberated for only 25 to 35 minutes before returning a guilty verdict, whereas Atwood's jury deliberated for two days.

It is well established that "in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934)[3]. However, the defendant's right to be present is not inviolate; it may be waived by consent or misconduct. *Id.* ("No doubt the privilege may be lost by consent or at times even by misconduct."); *accord Illinois v. Allen*, 397 U.S. 337, 342, 90 S. Ct. 1057, 1060, 25 L. Ed. 2d 353 (1970) (involving defendant's misconduct during trial); *United States v. Shepherd*, 284 F.3d 965, 967 (8th Cir. 2002) (same). The defendant's presence "'is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed. 2d 486 (1985) (quoting *Snyder*, 291 U.S. at 105-06, 54 S. Ct. at 332, 333); *accord Williams v. Kemna*, 311 F.3d 895, 898 (8th Cir. 2002); *United States v. Brown*, 923 F.2d 109, 112 (8th Cir. 1991). "[E]xclusion of the defendant from a trial proceeding should be considered in light of the whole record." *Gagnon*, 470 U.S. at 526, 105 S. Ct. at 1484 (citing *Snyder*, 291 U.S. at 115, 54 S. Ct. at 335).

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[3] *Snyder* was overruled in part on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Considering the whole record in the present case, the court finds Atwood waived his right to be present when the judge informed the jury about the threatening phone call by his failure to request that he be present. The court has found no authority, and Atwood has cited none, that would compel the trial court to require Atwood's presence in the absence of his request to be present, or to make an affirmative offer to allow him to be present.

However, even if Atwood's constitutional right to be present was violated, the court finds the error was harmless. The right to be present during all critical stages of the trial is subject to harmless error analysis, "unless the deprivation, by its very nature, cannot be harmless." *Rushen*, 464 U.S. at 117 n.2, 104 S. Ct. at 455 n.2 (citing *United States v. Morrison*, 449 U.S. 361, 364-65, 101 S. Ct. 665, 667-68, 66 L. Ed. 2d 564 (1981); *Snyder*, 291 U.S. at 114-18, 54 S. Ct. at 335-36; *Gideon v. Wainright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)). Even when Supreme Court precedent establishes a constitutional error, a *habeas* petitioner can prevail only by establishing "that the error had a substantial and injurious effect or influence in determining the jury's verdict."[4] *Penry v. Johnson*, 532 U.S. 782, 795, 121 S. Ct. 1910, 1919-20, 150 L. Ed. 2d 9 (2001) (internal quotation marks omitted) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113

[4]The court recognizes that the Eighth Circuit Court of Appeals has stated its intention to apply the stricter harmless error standard (harmless beyond a reasonable doubt) of *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967), in *habeas* cases where, as here, the state court failed to conduct a similarly rigorous test. *See Barrett v. Acevedo*, 169 F.3d 1155, 1164 (8th Cir. 1999). However, the Supreme Court decided *Penry* after *Barrett*, and reiterated the "substantial and injurious effect or influence" standard the Court had established previously in *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993), and continued to apply in *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S. Ct. 992, 994, 130 L. Ed. 2d 947 (1995), and *Calderon v. Coleman*, 525 U.S. 141, 147, 119 S. Ct. 500, 503-04, 142 L. Ed. 2d 521 (1998). Therefore, the court finds the latter standard applicable in the present case.

S. Ct. 1710, 123 L. Ed. 2d 353 (1993), in turn quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

In determining whether Atwood's absence from the trial judge's meeting with the jury "had a substantial and injurious effect or influence in determining the jury's verdict," the court is mindful that a trial judge's *ex parte* communications with jurors can be harmless under some circumstances. As the Supreme Court held in *Rushen*:

> Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant. "At the same time and without detracting from the fundamental importance of [these rights], we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving [such constitutional] deprivations are [therefore] subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 667, 66 L. Ed. 2d 564 (1981); *see also Rogers v. United States*, 422 U.S. 35, 38-40, 95 S. Ct. 2091, 2094-2095, 45 L. Ed. 2d 1 (1975). In this spirit, we have previously noted that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982). There is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The lower federal courts' conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice.

464 U.S. at 117-19, 104 S. Ct. at 455-56 (footnotes omitted).

Further, the determination of whether a constitutional error was harmless must be made on the totality of the record. The Supreme Court explained as follows:

> As the Court has recognized on numerous occasions, some constitutional errors do not entitle the defendant to relief, particularly habeas relief. *See, e.g., Brecht, supra*, at 637-638, 113 S. Ct. 1710; *O'Neal v. McAninch*, 513 U.S. 432, 435-436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995) (applying harmless-error review to an instruction that "violated the Federal Constitution by misleading the jury"). The court must find that the error, in the whole context of the particular case, had a substantial and injurious effect or influence on the jury's verdict.

Calderon v. Coleman, 525 U.S. 141, 147, 119 S. Ct. 500, 503-04, 142 L. Ed. 2d 521 (1998).

Considering the whole context of the present case, even if this court assumes, as did the Court in *Rushen*, that Atwood's constitutional right to presence was implicated by the trial judge's *ex parte* communication with the jury, the court finds, for the reasons set forth previously and discussed further in the next section of this opinion, that Atwood has failed to show either the information about the threat, or his absence when the information was communicated to the jury, resulted in "a substantial and injurious effect or influence in determining the jury's verdict." *Penry*, 532 U.S. at 795, 121 S. Ct. at 1919-20. The court therefore finds any error was harmless, and Atwood's petition should be denied on this claim.

C. Ineffective Assistance of Counsel

1. Law applicable to ineffective assistance of counsel claims

The standard for proving ineffective assistance of counsel was established by the Supreme Court in *Strickland v. Washington*:

> *First,* the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.*, 466 U.S. at 688, 104 S. Ct. at 2065.

The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). "Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful." *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996).

Furthermore, even if the defendant shows counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067.

Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id.* *See Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A petitioner must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. *See id.*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

2. Atwood's ineffective assistance of counsel claim

In the present action, Atwood claims his trial attorneys were ineffective because they "failed to participate in the meeting between the judge and jury concerning the telephone threat and [failed] to insist on individual *voir dire* of the jurors concerning the effect of the threat." *Atwood*, 602 N.W.2d at 784. The Iowa Supreme Court preserved this issue for postconviction proceedings "to allow the preparation of an adequate record and to allow the attorney[s] charged with ineffective assistance an opportunity to respond to the claim." *Atwood*, 602 N.W.2d at 785 (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)).

In his PCR action, Atwood argued his counsel "failed to perform essential duties by not being present and not having [Atwood] present at the time of the threat notification to the jury," and "by not requesting individual voir dire at the time that the threat was revealed to the jury." Ruling, *Atwood v. State*, No. FECR 17941 (Linn County, Iowa, Dec. 7, 2001) ("PCR Ruling") (attached as item 2 to Doc. No. 9), at 4.

During the PCR trial, one of Atwood's attorneys, Brian Sissel, referred in his testimony to off-the-record discussions between Atwood's attorneys and the trial judge, as follows:

> Q. [By Mr. Dunn, Atwood's PCR counsel] You had indicated that the reasons why you wanted to be present when the judge informed the jury of the threat earlier in your testimony, and my question is: Why didn't you ask to be present when the judge, when he informed the jury of the threat?
>
> A. [By Mr. Sissel] Our position was that the jury not be informed at all, and that during discussions, I remember at least two occasions where Judge Zimmer had time by himself after we had discussions, had time by himself, we would come back in, talk some more, and it was decided at one of those junctures

that he was going up with the court reporter by himself and no one else was going with him, basically.

Q. Was this done on the record or off the record?

A. I read through [the trial transcript] and I don't see anything in the record that talks about that, so obviously it was off the record.

Q. And who was present during that off-the-record discussion?

A. That would have been myself, Mr. Ross-Boon, Jeremy [Atwood] would have been present, Mr. Denton, and whether the court reporter was there or not, I don't know. I don't remember. A lot of times Wilma Porter, the court reporter, would be there and not be taking things down, sometimes she was.

Q. And where in the chronology of events did that off-the-record discussion occur?

A. That would have happened sometime before the 1:40 – bear with me for a moment here, sometime before the 1:40 time frame on page 867. Whether it was between 1:15 and 1:40, I don't know. It was sometime before the discussion on the record about what was going to take place.

Q. And on the record, I think on page 869, the Court talks about what the Court intended to do. In that off-the-record discussion did you tell the judge or did Mr. Ross-Boon tell the judge that you wanted to be present, that the defense wanted to be present when the judge told the jury about the threat?

A. That – not to be positive, but I know that came up in discussion as to who was going up, and the Court felt that if we were – if he was the only one that went up, that would be the best way to approach that.

Like I said, we didn't want any of this information to even go to the jury, but I know the decision was made that he was going up by himself. And did I specifically say I want to go up there, I don't know.

Q. You can't answer one way or another if you made a specific request to be in there with the judge?

A. My recollection is that I thought I did, but I can't sit here and testify under oath that I absolutely did.

Q. Would that have been the only time you requested to be present with the jury in that off-the-record discussion? Or did you have another off-the-record discussion after that when you requested to be present with the jury?

A. Well, what I will tell you is we – we hashed this thing over all morning. And obviously the transcript, it's not very many pages of on the record stuff.

What I can tell you is the final decision was made at the 1:40 time frame. We started on the record, the decision was made by then, so sometime in the morning, when the phone call came in and between – and up to 1:40, discussion was had.

Q. Did you read the Supreme Court's opinion in this case when it came down?

A. I'm sure I did.

Q. The Supreme Court's opinion, which is at 602 N.W.2d 775, the Supreme Court indicate that counsel did not ask to be present when the judge informed the jury of the threat. Do you dispute that?

A. I can't testify whether we did, whether I specifically did or didn't. I mean, it's not in the record. I thought we did, but it certainly is not in the record.

PCR Tr. at 19-22.

Sissel acknowledged there was nothing in the record to memorialize any off-the-record discussions between counsel and the trial judge. *Id.* at 23-24, 27. He further stated that despite how the trial transcript reads, neither he nor his co-counsel agreed it was

acceptable for the judge to meet privately with the jury. He testified that at the time the record was made, the judge had already decided how he was going to proceed. *See id.*, pp. 24-25 (referring to Trial Tr. p. 872, lines 13-19).

Atwood's other trial attorney, Shay Ross-Boon, referred briefly in his testimony to off-the-record discussions between counsel and the trial judge. He noted the trial transcript does not "portray[] the body language, if you will, and discussions off the record," but he recalled the trial judge "was pretty clear that he was going up there [to meet with the jury] alone," and Ross-Boon felt it would not have made a difference if they had asked to be present because the judge had already made up his mind. PCR Tr. at 53. However, Ross-Boon did not recall either he or Sissel ever specifically asking the judge if they could be present with their client while the judge spoke with the jury. *Id.* at 53-54. He also did not recall the judge ever stating, on or off the record, that the defendant and/or his attorneys could not be present in the meeting with the jury. *Id.* at 55.

Because the attorneys' testimony raised some question as to whether off-the-record discussions occurred between counsel and the trial judge about who would be present during the judge's meeting with the jury, Atwood's PCR counsel and the prosecutor jointly submitted several interrogatories to the trial judge to probe his recollection of the events. Counsels' letter to the judge and the judge's answers to the interrogatories appear in the Appendix filed in the PCR Appeal, Sup. Ct. No. 01-2039 (PCR App."), at pp. 15-20. In his responses, the trial judge indicated neither of Atwood's trial attorneys asked, in any off-the-record discussion with the court, to be present when the judge met with the jurors about the threat; neither attorney objected, off the record, to the judge's meeting alone with the jury in the absence of Atwood and/or his attorneys, nor did they raise any constitutional objection to that procedure; and the judge never informed defense counsel,

in an off-the-record discussion, that they could not be present when the judge met with the jury to inform them of the threatening phone call. PCR App. at 15-16, 19.

PCR counsel also asked the following two questions, reproduced here with the trial judge's responses:

> 5. Please discuss, in narrative fashion, your recollection of both [1] how the decisions were reached and [2] the relative participation of the parties/attorneys concerning the following:
>
> a. the decision to inform jurors of the 'threat'.
>
> b. the manner in which the jurors were informed.
>
> Answer: Just before final arguments were to commence, I was made aware a receptionist in the Public Defender's Officer had received an anonymous call indicating that trial participants including the prosecutor, defense counsel, and jurors would be killed unless a particular verdict was returned. The receptionist was very upset by the call and could not remember whether a verdict of guilty or not guilty was demanded. I immediately notified law enforcement authorities. As a result of the call, I suggested to counsel that final arguments be delayed until at least 1:00 p.m., to allow us to assess the situation. The parties agreed and those present in the courtroom were advised closing arguments were delayed until 1:00 p.m. The receptionist who received the threatening call was interviewed. During the balance of the morning, I met with a number of people including Cedar Rapids Police officers, several deputies from the Linn County Sheriff's Office, various courthouse personnel, and the Chief Judge of the Sixth Judicial District. I then directed that a number of additional security measures be taken to enhance the safety of the participants in the trial and the public. During this time, the jury was sequestered in the jury room. They had not been told of the incident.

In either late morning or early afternoon I met with counsel informally to discuss whether or not it was possible to proceed with closing arguments. I am sure I informed the parties of the additional security measures I had ordered. As I recall, it was apparent to counsel and the court as well that the additional security precautions which I had ordered could not be implemented in time to allow us to complete closing arguments that day. I believe both parties expressed a preference to begin closing arguments the following morning rather than having the arguments begin on one day and conclude on another. I also recall telling counsel that I intended to make a general statement in open court regarding the reason for the delay.

At 1:15 p.m. (according to the transcript) I advised the spectators present in the courtroom that closing arguments would be delayed until the following morning because of a threatening phone call. The jury was not present when this record was made. After we recessed I met with the attorneys and Atwood in chambers. I believe I advised counsel I felt a formal record should be made summarizing the events of the day. It is my recollection that I also informed the parties I wished to give both parties a chance to say on the record what course of action the court should pursue and that I intended to invite discussion regarding what to tell the jury. A short time later, we went on the record and I outlined the circumstances of the morning including the gist of the threatening call and invited discussion and suggestions from the parties regarding how to proceed and what to tell the jury. After hearing from the parties, I made my final decision regarding how to proceed, told the parties what I intended to do, and followed that plan.

6. Please describe the jurors' reactions when you informed them of the 'threat'.

Answer: As shown by the trial transcript, the jurors were provided with an opportunity to ask questions or make

> comments after I informed them of the threatening phone call. None of the jurors asked questions or made comments.

PCR App. at 16, 19-20.

After reviewing all of the evidence, including the trial judge's interrogatory responses, the PCR court denied Atwood's application for postconviction relief. The PCR court considered the issue of counsel's effectiveness pursuant to the *Strickland* standards. In considering the "performance" prong of the analysis, the PCR court noted:

> In looking at this prong, that is, whether counsel failed to perform an essential duty, the Court is to evaluate counsel's conduct in relation to that of others who face similar circumstances to determine whether or not the attorney's performance was within the normal range of competency. In this case such threats are not normal occurrences. According to the evidence received, this was a rare occurrence. Under these unusual circumstances, the Court must then determine whether or not counsel's conduct was reasonable given those circumstances.
>
> . . .
>
> The Court finds it reasonable and within normal competency to believe that the presence of all of the parties in front of the jury concerning this threat and/or individual voir dire of the jurors would unduly emphasize the threat and place more emphasis on it. That process, then, would, in itself, create more of an impact on the jury.
>
> The Court agrees with the State's position that [Atwood's] and his attorneys' presence would have put emphasis on the image of importance conveyed by the threat and thereby create a greater potential of adverse impact. In this instance the evidence had all been submitted. The parties were just waiting for closing arguments.
>
> In the matter before this court, Mr. Sissel and Mr. Ross-Boon were both questioned about whether or not they had requested to be present during the judge's

> communication with the jury. While they could not recall, it appears that they did not make such a request on the record. It was the assessment of both lawyers that Judge Zimmer was firm in his decision that he would go to the jury without [Atwood] and counsel present. Mr. Ross-Boon and Mr. Sissel both testified that they believed that the judge was clear that he was going to talk to the jury alone and that it would not have done any good to pursue a request to be present.
>
> Trial counsel testified that there was some discussion between them at the time about not wanting to exacerbate the situation. Counsel did not want to further emphasize the seriousness of the threat. The less reaction made would perhaps result in less impact on the jury.
>
> Both trial counsel testified that their strategy was that the jury should not be told; that the trial should be mistried if the jury was told and that the jury should be sequestered if told. They made those motions and arguments at trial. They lost.
>
> . . .
>
> The Court . . . finds that counsel was not ineffective considering all of the circumstances.

PCR Ruling at 6-8, 10.

Despite having found that Atwood's trial attorneys were not ineffective, the PCR court nevertheless also considered the prejudice prong of the *Strickland* analysis, holding as follows:

> This Court also looks at the second prong – whether prejudice resulted. [Atwood] here has made no affirmative showing that there was prejudice but urges that because [he] was not present for this communication there must have been prejudice. If counsel had been present, they would have been able to observe the jurors' reactions to the information of the threat. Trial counsel was questioned in this proceeding about the importance of being able to see jurors during jury selection.

However, this jury had been selected and had heard all the evidence. It was no longer an issue of getting rid of one juror in favor of a different juror. If some change in demeanor had been noted[,] counsel would most likely have moved for a mistrial. Counsel here moved for a mistrial.

"A court making the prejudice inquiry must ask if the Defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984). The record in this case from the trial record and Judge Zimmer's answers to interrogatories indicate that the jurors did not ask questions or make comments about what information they had received.

In Iowa, the standard for determining whether a defendant has demonstrated the requisite prejudice requires a defendant to prove "an actual prejudice standard," the same standard adopted in *Strickland*. *State v. Propps*, 376 N.W.2d 619, 623 (Iowa 1985). In *Taylor v. State*, 352, N.W.2d 683, 685 (Iowa 1984), the Iowa supreme Court adopted the "reasonable probability of a different result" test articulated in *Strickland* for analyzing resultant prejudice. *See Propps*, 376 N.W.2d at 623; *Mark v. State*, 370 N.W.2d 609, 612 (Iowa Ct. App. 1985). In applying this standard it is necessary to consider what is meant by a different "result." In making the decision whether there is a reasonable probability that the result of the trial would have been different, the burden of proof is on the defendant to establish this standard by a preponderance of the evidence.

The Court finds that [Atwood] has failed to establish the prejudice prong of the *Strickland* test and, therefore, his application should be denied. . . . [T]he Court finds that . . . [Atwood] has failed to demonstrate that a reasonable likelihood exists that but for counsel's alleged errors[,] the result would have been different. . . . The Court does not find counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as

> having produced a just result." *Strickland v. Washington*, 104 S. Ct. at 2064.

PCR Ruling at 7-10.

Atwood appealed the denial of his PCR application, and the Iowa Court of Appeals affirmed. The PCR appellate court noted it would have been error if the trial judge had denied a request that Atwood and his attorneys be present when the judge met with the jury, observing as follows:

> One of the basic rights guaranteed by the Confrontation Clause in the Constitution is the accused's right to be present in the courtroom at every stage of his trial. *See Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058, 25 L. Ed. 2d 353, 356 (1970); *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994); *State v. Meyers*, 426 N.W.2d 614, 616 (Iowa 1988); *see also* U.S. Const. amend. VI; Iowa R. Crim. P. 2.27(1). This right is not an absolute right, and it may be lost by consent or at times even by misconduct. *Allen*, 397 U.S. at 342-43, 90 S. Ct. at 1060, 25 L. Ed. 2d at 358; *Webb*, 516 N.W.2d at 830; *see also State v. Moore*, 276 N.W.2d 437, 440-41 (Iowa 1979); *State v. Blackwell*, 238 N.W.2d 131, 135 (Iowa 1976); Iowa R. Crim. P. 2.27(2). Although we may presume prejudice when a defendant is not present at trial, the presumption may be rebutted. *Webb*, 516 N.W.2d at 830; *State v. Wise*, 472 N.W.2d 278, 279 (Iowa 1991).

Atwood v. State, No. 01-2039, 2002 WL 31883007 (Iowa Ct. App., Dec. 30, 2002) ("PCR appeal"), at *2.

The PCR appellate court agreed with the PCR court's conclusion that Atwood's attorneys had not asked to be present with Atwood during the trial judge's meeting with the jury. *Id.* at *3. The appellate court reviewed the testimony of Atwood's trial attorneys at the PCR trial, noting Sissel believed it had been a mistake for counsel not to request on the record that they be present with Atwood when the judge met with the jury, in order to

observe the jurors' demeanors when they learned of the threat. The court found Ross-Boon, on the other hand, "was somewhat ambivalent about the issue." *Id.* The court also acknowledged the State's argument that "even if trial counsel were ineffective, the evidence was so compelling that the telephone threat and the manner in which defense counsel responded to it were not significant, given the evidence against [Atwood]." *Id.*

The PCR appellate court held as follows:

> The record indicates [Atwood's] trial counsel explored the way to handle the threat and considered various options, including the request for a mistrial. Ross-Boon testified that paying too much attention to the issue might have exacerbated it. The supreme court came to a similar conclusion in discussing [Atwood's] contention that if the trial court was to discuss the matter with the jury, it should have gone further and inquired of the jurors as to what effect, if any, the threat had on them. *Atwood*, 602 N.W.2d 780. The court in that discussion noted that to do as [Atwood] suggested, would magnify the event and exacerbate any effect it might have on the jurors. *Id.* In scrutinizing trial counsel's performance we are highly deferential and we indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A defendant is not entitled to perfect representation but rather only that which is within the range of normal competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). We agree with the postconviction court that trial counsel were not ineffective. The course they chose to take on the challenged issue was reached after considerable consideration and was a reasonable professional decision. We affirm on this basis.

Id.

In the present action, Atwood argues the Iowa courts "correctly identified the applicable principles of federal law as determined by the Supreme Court, but then

unreasonably applied the law to the facts of the case." Doc. No. 8, p. 41. He argues further, "The record does not support the Iowa Court's findings that [Atwood's] trial attorneys made a 'reasonable professional decision,' and thereby no prejudice resulted to [him], by not requesting to be with the trial judge when he informed the jury of the threat." *Id.* Atwood notes his trial counsel testified it was not "trial strategy" when they failed to ask to be present for the judge's meeting with the jury, and they both considered it important to see the jurors' reactions to the information about the threat. *Id.*

Atwood argues his trial attorneys were ineffective and he was prejudiced by their ineffectiveness. He notes the Iowa Supreme Court "did not find that the jurors' knowledge of the threat was harmless," or "the threat did not affect their partiality." *Id.*, p. 43. Noting "[c]ase law makes it clear that a 'threat' can affect the partiality of a jury," he claims that because there is no way to know how the information regarding the threat affected the jury, prejudice must be presumed, stating:

> The record in the instant case does not affirmatively show the trial court's *ex parte* communications with the jury had no prejudicial influence on the jury's verdict against [Atwood]. It cannot be concluded beyond a reasonable doubt that the communication under consideration did not create any reasonable possibility of prejudice.

Id., p. 45 (citing, *inter alia*, *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967) (presumption of prejudice that arises when constitutional error is committed may be rebutted by showing that error is harmless beyond a reasonable doubt)).

In support of his claim that he was prejudiced by his attorneys' actions, Atwood cites *Smallwood v. Gibson*, 191 F.3d 1257, 1279 (10th Cir. 1999); *Hallmark Industry v. Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973); *United States v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir. 1995); *Nevels v. Parratt*, 596 F.2d 344, 346 (8th Cir. 1979); and

Gov't of Virgin Islands v. Dowling, 814 F.2d 134, 140 (3d Cir. 1987). All of these were decided prior to *Williams*. Because, as noted above, the court is limited to considering Supreme Court jurisprudence, *Smallwood*, *Hallmark*, *Rodriguez*, *Nevels*, and *Dowling* are inapposite, except to the extent those courts' interpretations and application of relevant Supreme Court precedents might assist the present analysis.

In *Smallwood*, the court observed, "An accused has a constitutional right to be present during all critical stages of his or her trial." *Smallwood*, 191 F.3d at 1279 (citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (*per curiam*)). Other than taking notice of this well-established principle of law, *Smallwood* is not relevant to the present inquiry.

Atwood failed to cite to any specific page of the *Hallmark* opinion, and the court is unable to determine how the case bears any relevance whatsoever to Atwood's claims for relief.

In *Nevels*, the court held error occurred when the defendant was not present at an *in camera* hearing regarding possible juror misconduct. However, citing *Chapman*, the court affirmed the district court's denial of *habeas* relief, finding the presumption of prejudice was rebutted because the error was harmless beyond a reasonable doubt. *Nevels*, 596 F.3d at 346. The *Nevels* opinion is not instructive in the present case.

The portion of the *Rodriguez* opinion cited by Atwood focuses on two incidents. In the first, the court held a discussion with counsel in the defendant's absence regarding a jury inquiry. In the second, the trial court provided the jury with additional transcripts without consulting the defendant's counsel, based on counsel's prior agreement to provide the jury with transcripts. Neither example is useful in the present case. Atwood was present during his counsel's conversations with the trial court, and the court consulted Atwood and his counsel before speaking with the jury. In any event, in *Rodriguez*, the

Seventh Circuit relied on its own jurisprudence in conducting a harmless error analysis, and in holding the trial court's errors were harmless. *See Rodriguez*, 67 F.3d at 1316-17.

Similarly, in *Dowling*, the Third Circuit relied on its own jurisprudence and that of the Fifth Circuit in holding the trial judge erred in failing to develop a record sufficient to permit evaluation of potential prejudice to the defendant that might have arisen from the jury's receipt of extra-record evidence. In addition, *Dowling* is factually dissimilar to the case at bar.

Accordingly, none of the cases cited by Atwood will assist the court in considering this claim for relief. Further, as was the case in Atwood's first claim for relief, he has failed to offer any evidence at all to rebut the presumption of correctness afforded the findings of the Iowa courts, which concluded he had failed to show he was prejudiced by his counsels' alleged ineffectiveness. As discussed earlier in this opinion, there is simply nothing in the record to indicate the jurors' impartiality was affected by their learning of the threatening call. Because he has failed to show prejudice, the court does not reach the question of whether Atwood's trial attorneys were ineffective.

Notably, Atwood confuses the analysis by arguing the Iowa courts erred in failing to "conclude[], beyond a reasonable doubt, that the communications between judge and jury did not create any reasonable possibility of prejudice." Doc. No. 8, p. 37. That is not the standard to show prejudice under *Strickland*. As stated above, in order to show prejudice, Atwood must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Atwood confuses this standard with the standard for a harmless error analysis – an analysis the court does not reach because the court finds no error occurred.

For these reasons, the court finds Atwood has failed to show the Iowa courts decided this issue in a manner contrary to clearly established Supreme Court precedent, unreasonably applied the law to the facts of the case, or made an unreasonable determination of the facts in light of the evidence. Therefore, this claim must fail.

V. CERTIFICATE OF APPEALABILITY

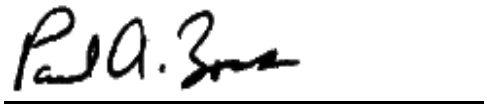
A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Atwood has made such a showing, and recommends a certificate of appealability be issued.

VI. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[5] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), within ten days of the service of a copy of this Report and Recommendation, that Atwood's petition be denied.

IT IS SO ORDERED.

DATED this 25th day of February, 2004.



[5]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT